TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~183~~ 217

ISRAEL M. NUNEZ AND RAPHAEL J. MOSES, AS I. M. NUNEZ & CO., PLAINTIFFS IN ERROR,

vs.

JOSEPH DAXTEL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

FILED OCTOBER 10, 1872.

SUPREME COURT OF THE UNITED STATES.

No. 433.

ISRAEL M. NUNEZ AND RAPHAEL J. MOSES, AS I. M. NUNEZ & CO., PLAINTIFFS IN ERROR,

vs.

JOSEPH DANTEL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

INDEX.

	Original.	Print.
Declaration	1	1
Process	4	2
Return	5	3
Plea of defendants	5	3
Plea of defendants	6	3
Similiter	6	3
Testimony	7	4
Trial	9	4
Verdict	9	4
Bill of exceptions	10	5
Writ of error	12	6
Bond	14	6
Citation	16	7
Clerk's certificate	17	8

a UNITED STATES OF AMERICA,
Southern District of Georgia:

At a stated term of the circuit court of the United of America for the southern district of Georgia, begun and held on Thursday after the first Monday of November, A. D. 1871, at the city of Savannah, in said southern district of Georgia—present and presiding, the Hon. W. B. Woods, United States circuit judge for the fifth judicial circuit, and the Hon. John Erskine, United States district judge for Georgia—on the twenty-ninth day of the term, to wit, on the eighth day of December, A. D. 1871, the following proceedings were had, to wit:

JOSEPH DANTEL
vs.
I. M. NUNEZ AND CO. } Assumpsit.

Be it remembered that, heretofore, to wit, on the tenth day of September, A. D. eighteen hundred and seventy, came the plaintiff, by his attorney, John D. Pope, esq., and filed his declaration in the words following, to wit:

1 *Declaration.*

UNITED STATES OF AMERICA,
Southern District of Georgia:

To the honorable the judges of the fifth circuit court of the United States for the southern district of Georgia:

The petition of Joseph Dantel, who avers himself to be a citizen of, and residing in, the State of Tennessee, in the said United States of America, sheweth that Isaac M. Nunez and Raphael J. Moses, partners, using the firm-name and style of I. M. Nunez & Co., who, your petitioner avers, are citizens of, and residing in, the State of Georgia, in the United States of America, are indebted to your petitioner in the sum of one thousand six hundred and nineteen dollars and sixty-six cents, besides interest.

For that whereas the said defendants heretofore, to wit, on the first day of September, in the year of our Lord one thousand eight hundred and sixty-five, at Columbus, to wit, in the southern district of Georgia aforesaid, made their certain due-bill in writing, bearing date the day and year aforesaid, and thereby promised, for value received, to pay to petitioner or order the said sum of one thousand six hundred and
2 nineteen dollars and sixty-six cents, which said defendants acknowledge by their said bill to be due from and after the date thereof, which period has now elapsed; and then and there delivered the said due-bill to petitioner, and then and there, in consideration of the premises, promised petitioner to pay the said sum of money specified in the same, according to the tenor and effect thereof.

For that whereas, also, the said defendants heretofore, to wit, on the first day of September, in the year of our Lord one thousand eight hundred and sixty-five, at Columbus, to wit, in the southern district of Georgia, were indebted to petitioner in the further sum of one thousand six hundred and nineteen dollars and sixty-six cents for money found to be due from the said defendants to petitioner on an account stated between them.

And whereas the said defendants, afterwards, to wit, on the day and year aforesaid, at Columbus, to wit, in the southern district of Georgia

aforesaid, in consideration of the said premises respectively, then and there promised to pay the said several monies respectively to your petitioner on request. Yet they have disregarded their said promises, and have not paid any of the said moneys in this petition mentioned, or any part thereof, to your petitioner's damage of three thousand dollars; and thereupon he brings suit, &c.

Wherefore your petitioner pray' process may issue, requiring the said defendants to be and appear at the clerk's office of said court, in the city of Savannah, at rules to be had on the first Monday in October next, to answer in the premises.

JOHN D. POPE,
Att'y for Petitioner.

$1,619.66.] COLUMBUS, GA., *Sept. 1st*, 1865.

Due Joseph Dantel or order sixteen hundred nineteen $\frac{66}{100}$ dollars, being balance of principal and interest for four years and six months' services. This we will pay as soon as the crop can be sold, or the money raised from any other source, payable with interest.

I. M. NUNEZ & CO.

Received two hundred dollars on account of the within note, and enclosed the same in check on National Bank of Republic, this 24th Dec., 1869, to Joseph Dantel, care of Capt. Welsh, 64 Cherry street, Nashville, Tennessee.

GEO. W. MORDECAI,
For Jos. Dantel.

Process.

UNITED STATES OF AMERICA,
Southern District of Georgia, ss:

In the fifth circuit court of the United States for the southern district of Georgia.

JOSEPH DANTEL
vs.
ISAAC M. NUNEZ AND RAPHAEL J. MOSES, composing firm of I. M. Nunez & Co.

The President of the United States to the marshal of the districts of Georgia, greeting:

The defendants, Isaac M. Nunez and Raphael J. Moses, composing the firm of I. M. Nunez & Co., are hereby required, personally or by attorney, to be and appear at the clerk's office of said court, in the city of Savannah, at rules to be had on the first Monday of October next, then and there to answer the plaintiff in an action of assumpsit, as in default thereof the said court will proceed as to justice shall appertain.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this twenty-sixth day of August, in the year of our Lord one thousand eight hundred and seventy.

[SEAL OF THE COURT.]

JOHN D. POPE,
Plaintiff's Att'y.

JAMES MCPHERSON, *Clerk.*

Return of service.

In the fifth circuit court of the U. States for the so. dist. of Georgia.

JOSEPH DANTEL
vs.
I. M. NUNEZ & Co.

We acknowledge due and legal service of the within writ and process, and waive copy and copy process.

MOSES AND DOWNING,
Atty's for Def'd'ts.

COLUMBUS, GA., *Sept.* 10, 1870.

Plea of defendants.

And, afterwards, to wit, on the third day of October, A. D. 1870, came the defendants, by their attorneys, Messrs. Moses and Downing, and filed their plea of gen'l issue, in the words following, to wit:

JOSEPH DANTEL
vs.
I. M. NUNEZ & Co.

6 And now comes the defendants and defend*s* the wrong and injury when, &c., and, for plea and answer, say they did not undertake and promise in manner and form as by the said plaintiff in his said declaration alleged; and of this they put themselves upon the country.

MOSES AND DOWNING,
Def'd'ts' Att'y's.

And plaintiff doth the like.

J. D. POPE, *Pl'ff's Att'y.*

Plea of defendants.

And, afterwards, on the seventh day of November, A. D. 1870, came the defendants, by their attorney, R. J. Moses, and filed their plea of statute of limitations, in the words following, to wit:

JOSEPH DANTEL
vs. Ass'p't.
I. M. NUNEZ & Co.

And, for further plea by leave of the court first had and obtained, the said defendants say that said plaintiff ought not to have or maintain his aforesaid action against him, because, they say, that the
7 said promise was made on a contract which accrued and was made *on a contract which accrued and was made* prior to the first of June, 1865, and that no suit was brought on the same prior to the 1st of January, 1870; and that, by the laws of the State of Georgia, the right of the plaintiff and all rights of action for its enforcement is forever barred.

R. J. MOSES,
Att'y for Def'd't.

And plaintiff says that said promise was not made on a contract which accrued and was made prior to June 1st, 1865; and this plaintiff prays may be inquired of by the country.

J. D. POPE, *Pl'ff's Att'y.*

Testimony.

(Copy note.)

$1,619.66.] COLUMBUS, GA., *Sept.* 1, 1865.

Due Joseph Dantel, or order, sixteen hundred and nineteen $\frac{66}{100}$ dollars, being balance of principal and interest for four years and
8 six months' services. This we will pay as soon as *soon as* the crop can he sold or the money raised from any other source, payable with interest.

I. M. NUNEZ & CO.

(On margin:)

[5-ct. stamp.] [One-dollar stamp.]

Submitted to me for stamps, the omission having occur'ed from necessity.

H. L. NEWELL.

Received two hundred dollars, on account of the within note, and enclosed the same in check on National Bank of Republic, this 24th December, 1869, to Joseph Dantel, care of Capt. Walsh, 64 Cherry street, Nashville, Tennessee.

GEO. W. MORDECAI,
For Jos' Dantel.

9 *Trial.*

And, afterwards, to wit, on the 8th day of December, A. D. 1871, the following further proceedings were had, to wit:

JOSEPH DANTEL
vs.
I. M. NUNEZ & CO. } Ass'p't.

And, afterwards, to wit, on the eighth day of December, one thousand eight hundred and seventy-one, before the judges of the said court, came the within-named plaintiff, by John D. Pope, attorney within named, and the said defendants, by W'm Dougherty and R. J. Moses, esq's, and the jurors of the jury, to wit: 1st, L. C. Warren, foreman; 2d, Jesse Cumming; 3d, Freeman Matthews; 4th, G. W. Lease; 5th, John Roberts; 6th, D. O. Alexander; 7th, Thomas J. Fuller; 8th, J. G. Mehrtens; 9th, R. T. Burch; 10th, A. B. McAfee; 11th, M. M. Benjamin; 12th, E. B. Chipman; likewise come, who, being called, elected, tried, and sworn to speak the truth of the within-contained, upon their oaths say:

Verdict.

We, the jury, find for the plaintiff balance of principal $1,419.66; interest, $674.39=$2,094.05, this 8th day of December, 1871.

10 Wherefore it is considered that the said plaintiff do recover against the said defendant damages aforesaid, by the jurors of the jury aforesaid, in form aforesaid assessed; also, forty-one dollars and 90 cents, costs and charges aforesaid, to the said plaintiff by the said court, now here, of increase adjudged, and with their assent; and the said defendant in mercy, &c.

JOHN D. POPE,
Pl'ff's Att'y.

Judgment signed & filed this 8th day of December, A. D. 1871.
JA'S McPHERSON, *Clerk.*

Bill of exceptions.

In the fifth circuit court of the United States for the so. dist. of Georgia.

JOSEPH DANTEL
vs.
I. M. NUNEZ & Co.

Be it remembered that, at a term of the fifth circuit court of the United States for the southern district of Georgia, being the November term, 1871, on the 8th day of December, the case of Joseph Dantel vs. I. M. Nunez & Co. came on to be heard, when the plaintiff, in support of the indebitat's count on an account stated, introduced the following paper in evidence, the execution of which was admitted by defendant, and closed his case:

COLUMBUS, GA., *Sept.* 1, 1865.

11 Due Joseph Dantel or order, sixteen hundred and nineteen $\frac{66}{100}$ dollars, being balance of principal and interest for four years and six months' services. This we will pay so soon as the crop can be sold or the money raised from any other source, payable with interest.

(Signed) I. M. NUNEZ & CO.

(Endorsed:) Stamps, $6.

JANUARY 31, 1866.

Submitted to me for stamps, this omission having occur'ed from necessity.

H. L. NEWELL.

Rec'd two hundred dollars, on account of the within note, and enclosed the same in check on Northern Bank Republic, this 24th Dec., 1869, to Capt. Walsh, 64 Cherry street, Nashville, Tennessee.

G. W. MORDECAI.

Defendant introduced as evidence, and requested the court to charge the jury, that, if plaintiff had proved a special agreement which was still operative, he could not recover for an account stated.

Whereupon the court charged the jury that the paper introduced did not prove such special agreement, and directed the jury, upon the evidence, to find a verdict for the plaintiff, and as the matters therein excepted to do not appear of record, the defendant now tenders this, his bill of exceptions, and requests the court to sign and certify the same.

W. B. WOODS, [SEAL.]
U. S. Judge 5th Circuit & So. Dist. of Georgia.

12 *Writ of error.*

I. M. NUNEZ & CO., PL'FFS IN ERROR,
and
JOSEPH DANTEL, DEF'D'T IN ERROR.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the fifth circuit court of the United States for the southern district of Georgia, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said circuit court before you, in an action of assumpsit, between Joseph Dantel, plaintiff, and I. M. Nunez & Co., a firm composed of Israel M. Nunez and Raphael J. Moses, a manifest error hath happened, to the great damage of the said I. M. Nunez & Co., defendants, as by their complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together
13 with this writ, so that you may have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court, the twelfth day of December, in the year of our Lord one thousand eight hundred and seventy-one.

[SEAL.] JA'S McPHERSON,
Clerk U. S. Circuit Court So. Dist. of Georgia.

Service of the writ of error acknowledged. Copy & further service waived.

Dec. 12, 1871.

J. D. POPE,
Att'y for Dantel.

14 *Bond.*

I. M. NUNEZ & CO., PL'FFS IN ERROR,
vs.
JOSEPH DANTEL, DEF'D'T IN ERROR.

Know all men by these presents that we, I. M. Nunez & Co., composed of Israel M. Nunez, Raphael J. Moses, and Ezra J. Moses, security, are held and firmly bound unto Joseph Dantel in the full and just sum of four thousand two hundred dollars, to be paid to the said Joseph Dantel, or his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals and dated this twelfth day of December, in the year of our Lord one thousand eight hundred and seventy-one.

Whereas lately at a term of the fifth circuit court of the United States

for the southern district of Georgia, in a suit depending in said court, between Joseph Dantel and Israel M. Nunez and Raphael J. Moses, composing the firm of I. M. Nunez & Co., judgment was rendered against the said I. M. Nunez & Co., for the sum of $1,419.68 prin-
15 cipal, and $674.39 *dollars* interest, amounting in the aggregate to two thousand and ninety four $\frac{39}{100}$ dollars, and the said I. M. Nunez & Co. having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Joseph Dantel, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next:

Now, the condition of the above obligation is such, that if the said I. M. Nunez & Co. shall prosecute said writ of error to effect and answer all damage and costs, if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

I. M. NUNEZ & CO. [SEAL.]
E. J. MOSES. [SEAL.]

Signed, sealed, and delivered in presence of—
JA'S MCPHERSON, *Clerk.*

Approved by W. B. Woods, U. S. circuit judge, 5th circuit, so. dist. of Georgia.

SOUTHERN DISTRICT OF GEORGIA, *ss:*

Raphael J. Moses, of the firm of I. M. Nunez & Co., and Ezra J. Moses, parties to the above bond, being duly sworn, depose and
16 say, each for himself, that he is a freeholder, residing in the said district, and that he is worth the sum of four thousand dollars over and above all his just debts and liabilities, and the amount exempted from levy and sale by the laws of the State of Georgia.

R. J. MOSES.
E. J. MOSES.

Sworn to and subscribed before me this 13th day of December, A. D. 1871.

JA'S MCPHERSON, *Clerk.*

Citation.

TO JOSEPH DANTEL, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error, filed in the clerk's office of the fifth circuit court of the United States for the southern district of Georgia, wherein I. M. Nunez & Co., a firm composed of Israel M. Nunez and Raphael J. Moses, is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

W. B. WOODS,
Judge 5th Circuit & So. Dist. of Georgia.

17 Service acknowledged of this citation, and further service and copy waived, Dec. 12, 1871.

J. D. POPE,
Att'y for Dantel.

Clerk's certificate.

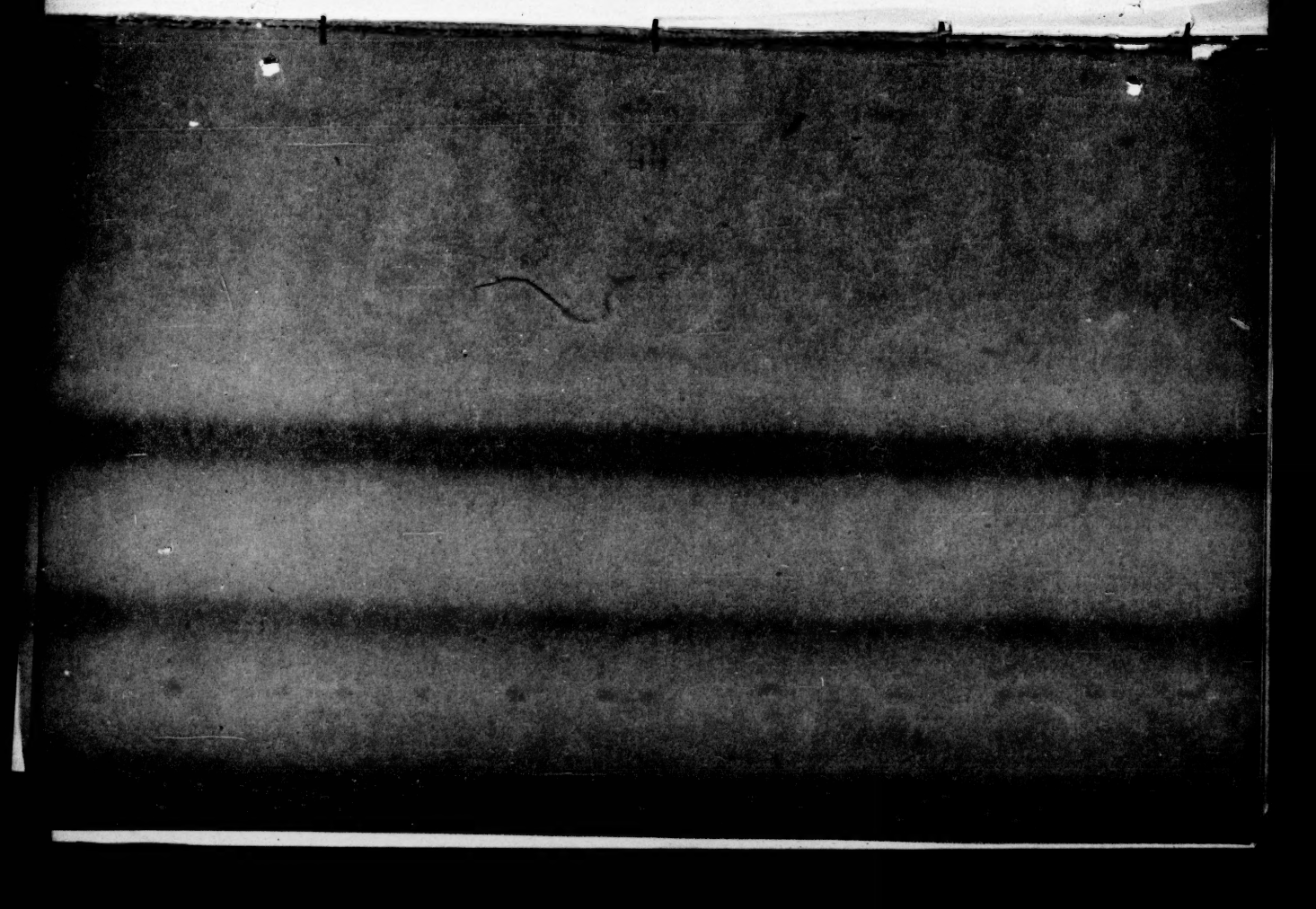
SOUTHERN DISTRICT OF GEORGIA, *ss:*

I, James McPherson, clerk of the fifth circuit court of the United States for the southern district of Georgia, do hereby certify that the foregoing seventeen pages of writing contain a full, true, and complete copy of the state of the pleading, the statement of facts, and of the proceedings in the above-named cause, as they remain of record on the records of the said circuit court.

In testimony whereof I have hereunto set my hand and affixed the seal of the said circuit court, this second day of August, A. D. 1872.

[SEAL.] JA'S McPHERSON,
Clerk of the Fifth Circuit Court of the U. S., So. Dist. of Ga.

(Indorsement on cover:) No. 433. Israel M. Nunez and Raphael J. Moses, as I. M. Nunez & Company, plaintiffs in error, vs. Joseph Dantel. S. Georgia C. C. U. S. Filed 10th October, 1872.



SUPREME COURT OF THE UNITED STATES

NO. 217.

I. M. NUÑEZ & CO.,

Plaintiffs in Error.

VS.

JOSEPH DAUTEL.

BRIEF OF JOHN D. POPE,

COUNSEL FOR DEFENDANT IN ERROR.

SUPREME COURT OF THE UNITED STATES.

No. 217.

I. M. NUNEZ & CO., vs. JOSEPH DAUTEL. } Assumpsit.

BRIEF.

This was an action of assumpsit, in which Dautel sought to recover of Nunez & Co. a certain sum of money, upon a count for *an account stated.* The pleas were: 1, Non-Assumpsit, and 2, The Statute of Limitations.

The only evidence adduced on the trial below, was the following written instrument:

$1619.66. Columbus, Ga., Sept. 1st, 1865.

Due Joseph Dautel, or order, sixteen hundred and nineteen $\frac{66}{100}$ dollars, being balance of principal and interest for four years and six months' services. This we will pay as soon as the crop can be sold, or the money raised from any other source, payable with interest.

I. M. NUNEZ & CO.

Received, two hundred dollars, on account of the within note and enclosed the same in check on National Bank of the Republic, this 24th Dec. 1869, to Joseph Dautel, care Capt. Welsh, Nashville, Tennessee.

GEO. W. MORDECAI,
For JOSEPH DAUTEL.

I. The second plea was not insisted on at the trial, and clearly, under the evidence, it could not have availed defendants below, because the Limitation Act of Georgia, which was intended to bar actions upon contracts which *had accrued, or were made, prior to June 1st*, 1865, has no application to a case where there has been an accounting and a new promise made since June 1st, 1865. The Supreme Court of Georgia held, in the case of Steadman *vs.* Simmons, that such a promise was a new contract.

39 Georgia R. 591.

The same doctrine prevails as a general rule in the construction of Statutes of Limitation, as was held in a case almost precisely like this in England.

Smith *vs.* Forty, 4 Carrington & Payne, 126.

II. It remains to be considered whether the evidence introduced by plaintiff entitled him to a recovery. It is said in Wagstaffe *vs.* Boardman, that "Evidence of an existing debt is sufficient to support a count upon an account stated."

9 Dow. & Ry. 248.

In Knowles *vs.* Michel, Lord Ellenborough says: "If there were an acknowledgment by the defendant of a debt due on any account, it was sufficient to enable the plaintiff to recover upon a count for an account stated."

13 East. 249.

"A party may recover the amount of an I. O. U. upon a count upon an account stated."

Payne *vs.* Jenkins, 4 Carrington & Payne, 324.

That an instrument which does not contain the requisites of a note, but showing an amount due from defendant to plaintiff, is admissible under the money counts, was ruled in Walrad *vs.* Petric.

4 Wendell, 575.

"The cases have come to this, that an admission of a certain sum being due in respect of a demand for which an action would lie, is evidence sufficient to support a count upon an account stated."

Porter *vs.* Cooper, 1 Crompton M. & R. 394.

III. It is difficult to imagine upon what ground plaintiffs in error can rest a plausible objection to the right of plaintiff below to recover upon the evidence adduced. It cannot be said that the money acknowledged to be due was payable either out of a particular fund or upon the happening of a contingency. The promise is to "pay as soon as the crop can be sold, or the money raised from any other source." The amount is acknowledged to be due in general terms, and the promise to pay is absolute and unconditional. It is defendants' own debt, and is not to be paid out of any other person's estate, nor out of the proceeds of goods or claims left in the hands of the promisers for that purpose, nor is the debt to become due at a subsequent time. The instrument begins, "Due Joseph Dautel, &c." It was for four years and six months' services already rendered. More than that, it was for the balance of principal *and interest* for said services. The fact that the debt had already drawn interest, shows that it was already past due. And it was to continue to draw interest after the acknowledgment was given. The money had been due so long before the suit was brought, that defendants

below first betook themselves to the plea of the Statute of Limitations, and finding that this would not avail them, they then insisted that the money was not yet due, because it did not appear that the crop was sold, or that the money had been "raised from any other source." They claim that the addendum to this acknowledgment of a debt long since due has the effect to compel plaintiff below to await their pleasure or convenience for his money. This proposition has the appearance of novelty, and it will tax the learning and research of counsel upon the other side to produce an authority to sustain it. In Smith *vs.* Forty, 4 Carrington & Payne, 126, the evidence was that defendant in agreeing to the correctness of the account said: "I hope Mrs Smith will not press me for the money, *for I will pay her as soon as I can, with interest.*" The court held this evidence sufficient to entitle plaintiff to recover upon a count for an account stated. It being clear that the money was due before the acknowledgment was given, the decisions are uniform that, even if plaintiff below had expressly agreed to give time, he would not be bound by the agreement unless it was made upon a good or valuable consideration.

Gibson *vs.* Renne, 19 Wendell, 389.
Varnum *vs.* Milford, 2 McLean, 77.
McLemore *vs.* Powell, 12 Wheaton, 554.
Creath's Adm'r *vs.* Sims, 5 Howard, 192.

But we hear nothing of any consideration for an extension, if an agreement for time could be properly inferred from the evidence.

It is respectfully suggested to the court, that this is so plain a case of a writ of error sued out for delay only, that there ought to be a judgment for damages under the rule.

JOHN D. POPE,
Counsel for Defendant in Error.

Supreme Court of the United States.

ISRAEL M. NUNEZ AND RAPHAEL J. MOSES, AS I. M. NUNEZ & CO., PLAINTIFFS IN ERROR,
vs.
JOSEPH DAUTEL, DEFENDANT IN ERROR.

No. 217.

Brief of R. McP. SMITH, *of Counsel for Defendant in Error.*

I ask for the imposition of the *ten per cent. penalty*, the writ of error being frivolous, clearly aiming at *delay* only.

The suit was to recover a balance of wages due Dautel from I. M. Nunez & Co. The latter plead the general issue *in assumpsit*, and also specially plead that the promise alleged in the declaration was made "on a contract which accrued and was made prior to the 1st of June, 1865, and that no suit was brought on the same prior to the 1st of January, 1870, and that by the laws of Georgia the right of the plaintiff, and all rights of action for its enforcement, is forever barred."

There was no matter, however, in the case to which this plea could apply. The only evidence was the following paper, of which the execution was admitted:

"COLUMBUS, GA., *Sept.* 1, 1865.

"Due Joseph Dautel, or order, sixteen hundred and nineteen $\frac{66}{100}$ dollars, being balance of principal and interest for four years and six months' services. This we will pay

so soon as the crop can be sold, or the money raised from any other source, payable with interest.

"I. M. NUNEZ & CO."

A credit of $200 was endorsed, December 24, 1869.

The bill of exceptions contains nothing additional to the foregoing except the following:

"Defendant introduced as evidence, and requested the court to charge the jury, that if plaintiff had proved a special agreement which was still operative, he could not recover for an account stated. Whereupon the court charged the jury that the paper introduced did not prove such special agreement, and directed the jury upon the evidence to find a verdict for the plaintiff; and as the matters therein excepted to do not appear of record, the defendant now tenders this his bill of exceptions, and requests the court to sign and certify the same.

"W. B. WOODS,
"*U. S. Judge, Fifth Circuit*," &c.

It does not appear *that any exception was taken upon the trial* to the ruling of the court. Exceptions must be taken *before the retirement of the jury from the bar.* The record must show that the exception was "*then and there*" taken. This has again and again been decided here. If these precise words may be omitted, at all events this court must be able to see from the face of the record that the exception was *taken during the trial.* This cannot be gathered from anything in this record. The omission is fatal.

But were this otherwise, what is complained of? The declaration contained two counts—one upon the paper aforesaid as a due bill, and one upon an account stated. The counsel for Dautel below introduced the paper under his second count, as evidence of an account stated. The defendants assumed the position that the paper was "a

special agreement, which was still operative;" and that as such it precluded a recovery upon an account stated. The court held that the paper was *not* such a special agreement as would preclude a recovery upon an account stated. This is the sole error imputed.

The paper was dated September 1, 1865. The promise to pay was "so soon as *the* crop can be sold, *or*," &c., upon the happening of *either* contingency. The suit was brought August 26, 1870, long after the crop could have been sold.

If we regard the lapse of the time when the crop could be sold as turning the paper into a due bill, payable on demand, then as such it might have been introduced under the first count of the declaration. In this view, the complaint of defendants is that the paper, which might have been introduced under the first count, was in fact introduced under the second—a grave matter truly.

But the court was right in viewing the paper as the evidence of an account stated. The provision as to the time of payment was not "*still operative*" at the time of suit. The lapse of time had expunged the provision. This left merely the acknowledgment of a given amount as the balance due Dautel for four years and six months' services, and a *superfluous* promise (since this would have been implied anyhow) to pay it with interest. What makes a stated account? The parties look over each other's accounts, and agree that such and such a balance is due to one or the other. One gives the other a receipt in full of his account, for which he has received the amount as a credit on the account of the other; and he admits that he owes that other the balance remaining after this credit has been given. A admits that he owes B a given sum as such a balance. He dates and signs this admission. It would not add to this to annex the words, "which I promise to pay on demand," for the law adds that promise anyhow.

The words added to the admission in the present case perhaps compelled Dautel to wait for awhile; but the time had passed, and this part of the agreement become inoperative, before the suit was brought, leaving the remainder of the paper wholly within the strictest definition of an account stated.

But in either view of the paper constituting the sole evidence in the case, the exception is frivolous.

R. McP. SMITH,
of Counsel of Defendant in Error.

Supreme Court U. S.

I. M. NUNEZ & CO.,

Pl't'ff in Error,

Against

JOSEPH DAUTEL,

Defendant in Error.

Brief for Plaintiff in Error.

RAPHAEL J. MOSES, Jr.,

For Plaintiff in Error.

Supreme Court United States.

I. M. NUNEZ & Co

ASSIGNMENT OF ERRORS.

The plaintiff assigns as error:

1st. That the Court refused to charge:

"If plaintiff had proved a special agreement, which was still operative, he could not recover for an account stated."

2d. That the court charged:

"That the paper introduced did not prove such special agreement."

3d. That the Court directed a jury upon the evidence to find a verdict for the plaintiff.

Defendant below plead the general issue.

Upon the trial the only evidence introduced was the above instrument.

The Defendants in the Court below requested the Court to charge.

Supreme Court United States.

I. M. NUNEZ & Co.,

Pl't'ff in Error,

Against

JOSEPH DAUTEL,

Def't in Error.

Brief for Pl't'ff in Error

STATEMENT.

An action of *indebitatus assumpsit* was brought on a written instrument in words and figures following:

$1,619$^{66}_{100}$ COLUMBUS, Ga., Sept. 1, 1865.

Due Joseph Dautel, or order, sixteen hundred and nineteen dollars and sixty-six cents, being balance of principal and interest for four years and six month's services.

This we will pay as soon as the crop can be sold, or the money raised from any other source, payable with interest.

I. M. NUNEZ & Co.

The first count was upon the instrument, and the second upon an account stated.

Defendant below plead the general issue.

Upon the trial the only evidence introduced was the above instrument.

The Defendants in the Court below requested the Court to charge.

"If Plaintiff had proved a special agreement which was still operative, he could not recover for an account stated."

The Court charged,

"That the paper introduced did not prove such special agreement," and directed the jury, upon the evidence, to find a verdict for the Plaintiff.

And the error alleged is raised upon exception to the above direction of the court.

The charge and direction of the Court are assigned as error

BRIEF.

In all actions of *indebitatus assumpsit*, the promise, either express or implied, is the gist of the action.

Buller, N. P., 129.

In this case, there being an express promise, none can be implied.

Expressum facit cessare tacitum.

Broom's Legal Maxims, 281.

The express promise in this case, being conditional, will not alone support the verdict.

Chitty Pleadings, 11th Am. Ed., 340, note 4.

The precise question, we think, was decided on a full review of the authorities, in

Tanner v. *Smart*, 6 B. & C. 609.

RAPHAEL J. MOSES, JR.,

For Pl'ff in Error.

Supreme Court U. S.

I. M. NUNEZ & CO.,

Pl't'ff in Error,

against

JOSEPH DAUTEL,

Def't in Error.

Reply to Brief of Defend't in Error.

RAPHAEL J. MOSES, Jr.,

For Plaintiff in Error.

Supreme Court United States.

I. M. NUNEZ & Co.,

Pl't'ff in Error,

against

JOSEPH DAUTEL,

Def't in Error

Reply to briefs filed for Def't in Error.

I.

Mr. Smith, in his brief, raises a preliminary objection that the bill of exceptions does not show that they were taken at the trial while "the jury were still at the bar."

It is admitted that this fact need not appear by express terms; if it be fairly inferable from all the statements in the bill it will suffice.

Phillips' Practice 143, and cases cited.

The reason of the rule is given, page 141.

"For where the judge is informed at the time that one of the parties excepts to his opinion, he has an opportunity of reconsidering, or explaining it to the jury," and *Phelps* v. *Mayer*, 15 How., 166, is cited in support, in which case Mr.

Chief Justice Taney uses the identical language above quoted.

It is clearly inferable that the exceptions were taken while the jury "were still at the bar."

The charge contains but a single proposition, and the bill of exceptions shows that it was in direct contradiction to the request to charge by the defendant; that the case turned upon this single point, and that the bill of exceptions was presented and signed on the same day, for, though not dated, it is set out in the record and certified by the clerk of the court as a part of the proceedings had on the 8th day of December, the record shows the writ of error to have been sued out, and citation served, within four days thereafter.

The bill of exception says: And as the matters therein, *excepted to*, do not appear of record, the defendant *now* tenders this his bill of exceptions.

The judge evidently in signing the bill of exceptions must be understood as certifying that the matters set out in the bill of exceptions *had been* excepted to. It is replied to this, that it does not set out *when* it was excepted to. True, but a bill of exception lies only for *matter excepted to at the trial* (*Sheppard* v. *Wilson*, 6 How. 275), and when a judge, on the day of the trial, signs a bill of exceptions, and says simply the defendant excepted, nothing else appearing, the court will not presume the exception to have been taken after it might have been legally taken, but rather that the law was complied with.

The case of *The United States* v. *Wilkinson et al.* (12 How. 252) is sufficient authority. In that case, where a bond was ruled out of evidence, the bill of exceptions simply states: "Whereupon the attorney for the United States excepted."

The words used in this bill of exceptions are equally as

broad; but it may be suggested that there are no commas before and after the words "excepted to," in the printed record of the bill of exceptions. As to the comma after the words "excepted to," it will be found to be a typographical error. The original copy record has it, and an inspection of it will also show the reason for the omission of the first. The word "*therein*," in the sentence "and as the matters therein, excepted to, do not appear of record," comes at the end of a line. I scarcely thought this typographical error necessary to be noticed, but it is stated that the Supreme Court of Texas have decided the election laws of that state unconstitutional, because a semicolon was misplaced in the sentence, and as two commas are its equivalent I desire to be fully protected.

The rule that the bill of exceptions must show the exceptions to have been taken at the trial, is in *furtherance* of justice.

In *Hutchings* v. *King*, 1 Wall. 60, the court considered exceptions which did not appear to have been taken at the trial, where it was stated by the justice holding the court that such was the fact. The *reason* for the exception being taken at the time, is that the judge's attention may be specifically called to the proposition considered erroneous. Not that it is supposed for an instant that a judge whose attention has been specifically called to a proposition will make a more careful examination of the law, if he is informed it is the intention of the parties objecting, to have the matter reviewed.

In this case the attention of the judge was specifically and pointedly called to the proposition of law in his charge, and the supposed error therein. I invoke the legal maxim, *cessat ratio cessat lex*, in this case.

As additional evidence of the truth of the matter, I ask

the attention of the Court to that part of the record which shows Mr. Pope *alone* appeared for the defendant in error below, and in his brief, cognizant as he was of the truth, there is not a suggestion that the exception was not taken while the jury were still at the bar. The Court may in its discretion notice any error apparent on the face of the record. This record presents all the evidence offered below —a single written instrument.

It is the province of the Court to pass upon the legal effect of that instrument, and if the Court is of the opinion that there is an apparent error in the judgment rendered, it will use the discretion confided it, to promote justice, and to prevent a failure thereof, by what it is apparent in this case is at most a mere clerical omission.

United States v. *Morgan et al.* 11 How. 159.
Etting v. *Bank of United States*, 11 Wheat. 59.

II.

Mr. Smith insists, ironically, that it is "*a grave matter, truly,*" that an instrument which could have been introduced under one count of a declaration is introduced under another. I desire to strengthen the position taken by the defendant's counsel, for this is the gist of the matter alleged to be erroneous.

The first count set out the instrument according to its supposed legal effect. There was no attempt to introduce the note under that count. Why? Because the count alleged that by said instrument the defendant below (the plaintiff in error here) promised to pay the said sum, at a day which has *long since elapsed.* The note introduced did not show such a promise, but a promise to pay on the happening of one of two contingencies. Here was clearly a variance, and the

plaintiff resorted to the count upon an account stated, and because it was introduced under this count it was held to show a promise to pay on a day *long since elapsed*—after counsel had abandoned his first count because it would not so show. I think the court will agree in earnest with what Mr. Smith insists upon, *ironically*, that it was made *a grave matter, truly*, under which count of the declaration this instrument was introduced.

The court will remember that in this case the general issue was plead, so that there is nothing admitted by the pleadings. Under such circumstances, to claim that a particular piece of evidence has any different weight when introduced under one count or another of a declaration is a conclusion demonstrably erroneous. A particular piece of matter will weigh the same on every correct scale it is placed, and so must a particular idea conveyed by words, on every scale of reason it may be weighed. A proposition so self-evident, I did not search for authority to sustain, but the labors of defendant's counsel have furnished me one.

Walrad v. *Petrie*, 4 Wend. 575.

III.

The request to charge was, that if the plaintiff had proved a special agreement *still operative* he could not recover on account stated. The court charged, the instrument introduced did not prove *such* special agreement. There can be no doubt that the words, "This we will pay as soon," &c., are the external signs of a special agreement. Two answers contradictory of each other are given by Mr. Pope and Mr. Smith, defendant's counsel in this case, to justify the charge of the court: First, by Mr. Pope, that there is no proof Dautel

ever agreed to this extension of time, and, second, that if he had expressly agreed to it, it would not be binding on him, as being without consideration. It is sufficient answer to say, that Dautel is suing on this instrument, and that, except this instrument, there is not one particle of evidence in the case to connect plaintiff and defendant. It cannot be relied on in part, and rejected as to part; it must be accepted or rejected altogether.

Mr. Smith says it was operative some time ago, but it is not *still* operative, because the *lapse of time has expunged the provision.* As a matter of fact, the assertion is erroneous, and no such pretension was made in the court below. As a matter of law, it is equally erroneous, for the legal maxim is, *de non apparentebus et de non existentibus eadem est ratio.*

The court may take judicial notice of lapse of time, when measured by public and historically recognized divisions, as if the note had read one year, one month, or one day, &c., after date; but when the parties have mutually agreed that this time is to be measured by private and special periods, as to the duration of which there is no general public knowledge, it is manisfestly wrong to say that lapse of time can be judicially recognized by the court as expunging the provision. To make my view in this matter perfectly intelligible, suppose A and B agree that by "band" is to be understood twelve months from date, and draw an agreement promising to pay at "band" so much money. Could any court, without evidence as to the meaning of this word "band," say that the lapse of time has expunged the provision?

In the case before the court the promise is to pay as soon *as the crop* can be sold, or the money realized from any other source.

Evidently it was in contemplation of the parties that

there was a *particular crop* which, when sold, would realize sufficient to pay the due-bills, and had the note been carefully drawn it would have read: As soon as the money can be realized from the sale of the crop, or from any other source. And this I regard as the true construction of the instrument; but taking it strongest against the obligor, it means as soon as a period of time, sufficient to sell the crop, has elapsed. Is there anything in the instrument to show what crop, of what year or kind was intended? If this proof could have been made the plaintiff might have proceeded under his first count. There can be no doubt, in the mind of the court, that the plaintiff knew well to what crop it referred. Applying the legal maxim above quoted, the Court are bound to find that the lapse of time had not expunged the provision.

This position is not taken here for the first time, the brief filed by Mr. Pope (page 6) is sufficient evidence that he was fully acquainted with the defense set up. He quotes it as the defense of the defendant, and in no way pretends to overcome it, except by the assertion that that part of the agreement is to be erased, and is of no validity. All the authorities he quotes in his support are cases where an agreement to extend the time of payment was set up as a *defense* by the defendant to some *other* obligation. I do not hesitate to assert that no authority has, and none ever can be found authorizing a plaintiff to recover upon part of an agreement, and at the same time hold the balance of the agreement invalid. Even Rabelais could find no greater reproach to hurl at Tribonian, than to accuse him of "cutting morsels out of the law to suit his own interest, and suppressing the remainder."

It seems almost superfluous to quote authorities to sustain the position that where A promises to pay a sum of money on the happening of a particular event, it is neces-

sary to show that the event *has happened*, before A's promise can be adjudged obligatory. But see

Pl. Com. 25-6.
Tidd's Prac. 436.
1 Chitty's Pl. 278.
Story on Promissory Notes, §25.

RAPHAEL J. MOSES, JR.
For Plff. in Error.